

2011 ETHICS SEMINAR

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ETHICS & PROSECUTION: **Our Duty to Prosecute the Ethical Criminal Case**

Presented by:

ELEANOR ODOM

Fellow/Senior Attorney, NCPCA/NDAA
ALEXANDRIA, VA

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 W. Camelback Rd., Ste. 202
Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

KIM MACEACHERN
STAFF ATTORNEY

ELEANOR ODOM

Fellow/Senior Attorney
NCPA/NDAA
44 Canal Center Plaza; Ste 110
Alexandria, VA 22314
(703) 519-1671
Eodom@ndaa.org

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In other words, I
swiped all this stuff

RIPPED FROM THE HEADLINES!!

- LAWYER IS CHARGE W/PROSTITUTION, ALLEGEDLY TELLS POLICE SHE GAVE IT UP AFTER PASSING BAR

www.ABAjournal.com/news/article/ June 2, 2011

RIPPED FROM THE HEADLINES!!

- Prosecutor concerns about Defense Spur Reversal; Lawyer Accused of calling client 'Toast'
- Sex abuse defendant
- Prosecutor informed court administrator after guilty verdict.

TOAST!!



- Defense attorney said the defendant admitted guilt
- She did not want to question a child sexual abuse victim
- After verdict: big smile, thumbs up & said "he's toast!"



PROSECUTION

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.

PROSECUTION

The [Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

PROSECUTION

As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

BERGER v. UNITED STATES,
295 U.S. 78, 88 (1935).

Mr. Justice Sutherland

DEFENSE

But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.

DEFENSE

Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage,

DEFENSE

unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth.

DEFENSE

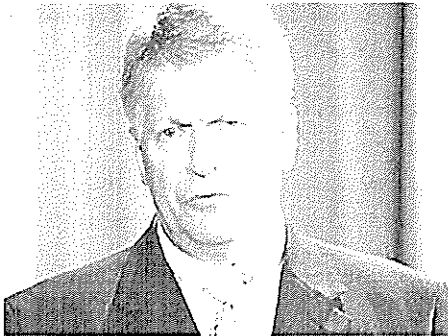
Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying.

U.S. Wade, 388 US 218 (1967).

Mr. Justice WHITE, whom Mr. Justice HARLAN and Mr. Justice STEWART join, dissenting in part and concurring in part.
256-258

PROSECUTION FUNCTION

- National Prosecution Standards
- 1-1.1 The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation & presentation of the truth.



www.foxnews.com/story/0,2933,265297,00.html

ABA Standards

- ProsecutionFunction
- 3-1.2(b)
- The Prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his/her functions.

ABA STANDARDS

- 3-1.2(c)
- The duty of the Prosecutor is to seek justice, not merely to convict.

PROSECUTION FUNCTION

- Unlike defense counsel:
- "The defense attorney is the only person in the room whose obligation is not to do justice"
 - Lawrence Vogleman, NACDL Board Member, ABA Journal 2003

SPECIAL RESPONSIBILITIES of a PROSECUTOR

- National Prosecution Standards 1-1.2
- Zealous in protecting the rights of individuals
- But, must place the rights of society in a paramount position in exercising discretion

CHARGING DECISIONS

Model Rules of Conduct:

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

CHARGING DECISIONS

National Prosecution Standards (NPS) 4-2.2 Charges Substantiated

The prosecutor should file only those charges that he or she believes adequately encompass the accused's criminal activity and which can be substantiated by admissible evidence at trial.

CHARGING DECISIONS

- ABA Standards for Criminal Justice
- 3-3.4(c)
- The prosecutor should establish standards & procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

CHARGING DECISIONS

Old NPS

43.4 Inappropriate leveraging

The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.

CHARGING DECISIONS

New NPS

4-2.3 Improper leveraging

The prosecutor should not file charges where the sole purpose is to obtain from the accused a release of potential civil claims.

CHARGING DECISIONS

ABA Standard 3.3-9

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.

CHARGING DECISIONS

ABA Standard 3.3-9 cont.

(a) cont.

A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient *admissible* evidence to support a conviction.

CHARGING: FACTORS TO CONSIDER

- Nature of offense, including whether crime involves violence or bodily injury;

The probability of conviction;

The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused's criminal history;

Potential deterrent value of a prosecution to the offender and to society at large;

The value to society of incapacitating the accused in the event of a conviction;

The willingness of the offender to cooperate with law enforcement;

The defendant's relative level of culpability in the criminal activity;

The status of the victim, including the victim's age or special vulnerability;

- Whether the accused held a position of trust at the time of the offense;
- Excessive costs of prosecution in relation to the seriousness of the offense;
- Recommendation of the involved law enforcement personnel;

FILING OF CHARGES

- What about "I knew he did it" theory vs. "let's cause him some aggravation" theory.
- Always remember ethics and rules of conduct

FACTORS NOT TO CONSIDER

- a. The prosecutor's individual or the office rate of conviction;
- b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
- c. Political advantages or disadvantages that a prosecution might bring to the prosecutor

RIPPED FROM THE HEADLINES!!

- DEFENSE LAWYER SUBPOENAS DOCS DETAILING PROSECUTOR'S CASH BONUSES FOR CONVICTIONS!

<http://www.abajournal.com/news/article/> April 7, 2011

- Colorado
- Bonus program created in 2010 by DA
- Paid to felony prosecutors
- 70% win record (w/5 trials)
- Average Bonus: \$1,100



CHARGING DECISIONS

- National Prosecution Standards
- 4-2.2 The Prosecutor should file charges which adequately encompass the accused's criminal activity and which he/she REASONABLY believes can be substantiated by admissible evidence @ trial.

PLEA OFFERS

- National Prosecution Standards 5-3.1
- Some factors to consider:
 1. emotional/physical trauma to victim
 2. nature of offense
 3. criminal history of defendant
 4. possible mitigating circumstances
 5. availability/willingness of witnesses to testify
 6. defendant's remorse & willingness to accept responsibility

DISCOVERY OBLIGATIONS

- National Prosecution Standards 4-9.1
- Goals of pre-trial discovery are to expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet requirements of due process.
- Continuing duty to disclose
- Carry out in good faith
- Brady v. Maryland, 373 U.S. 83 (1963)

RELATIONS W/SUSPECTS & DEFENDANTS

- Communication w/Unrepresented Defendants: NPS 2-7.2
- Should ID as prosecution & doesn't represent Defendant.
- Advise of rights, if required
- Terminate if Defendant asks for an attorney!

RELATIONS WITH SUSPECT & DEFENDANTS

- Communications w/Represented Persons
NPS 2-7.1
- May communication in absence of counsel
when
 - Counsel consented
 - Communication authorized by law/order/court
rule

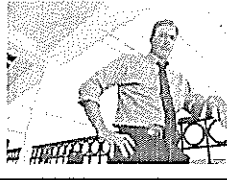
**WOULD YOU BUY
A USED CAR
FROM THIS
MAN??**



cache.daylife.com/.../068hfn67TPeWA/610x.jpg

RELATIONS W/DEFENSE COUNSEL

- Propriety of Relations: NSP 2-8.2
- In all contacts w/members of the defense bar, the prosecutor should strive to preserve proper relations.



RELATIONS W/VICTIMS

- Information Conveyed to Victims:
- NPS 2-9.1
- Acceptance/Rejection of Case
- Pre-trial disposition
- Date of hearings, trial, sentencing

HOW DO YOU HANDLE THE CASEY ANTHONY TRIAL?

- George & Cindy Anthony:
 - Witnesses
 - Victims
 - Defendant's Family



cbsmiami.files.wordpress.com/2011/05/casey-an...

PROSECUTORS & THE MEDIA

- Information appropriate for media dissemination by prosecutors: NPS 2-14.3
- Accused's name, age, residence, occupation, family status, and citizenship
- Substance of charge (indictment)
- Existence of Probable cause

- ID of investigating agency, length of investigation
- Circumstances of arrest
- Info in a public record, the disclosure of which would serve the public interest.

CONSIDER

- ABA Standard for Criminal Justice
- 3-2.9 Prompt Disposition of Criminal Charges
- (a) A prosecutor should avoid unnecessary delay in the disposition of cases!
- Due diligence!

PRESSURES ON PROSECUTOR

- Child Abuse Case:
- Sentencing: Mom wants to lowball
- You want stiff sentence
- What do you do?
- Is this an ethical issue?

PRESSURES ON PROSECUTORS

- Elder Abuse case where son has neglected his mother
- She doesn't want to prosecute her son
- What do you do?
- Is this an ethical issue?

PRESSURES ON PROSECUTORS

- Homicide case where victim is "unsympathetic"
- Victim = drug addicted gang member
- Needed killin'
- How do you resolve this case?

MORAL OF THE STORY

- Prosecution is not to "win at all costs" or "snatch victory from the jaws of defeat"
- YOUR GUIDE: Do your actions and behavior in the course of the investigation and prosecution meet the ethical standards as set out by your State?
- HAVING A REPUTATION AS AN ETHICAL PROSECUTOR: PRICELESS

NDAA UPDATES ON ETHICS

- UPDATE Vol. 4, Number 2, 2007
- Ethical Considerations in Undercover Online Investigations by L. McPherson
- UPDATE Vol. 20, Number 1, 2007
- Key Ethical and Practical Issues in Child Abuse Case Screening by M. Sawicki
- UPDATE Vol. 17, Number 1, 2004
- Ethical Obligations of Child Abuse Prosecutors and Allied Professionals by D. Wilsey

NATIONAL PROSECUTION STANDARDS

- Go to:
- www.ndaa.org/publications/apri/index.html

- The impact of the crime on the community;
- Any other aggravating or mitigating circumstances

CONTACT US

- NCPCA
- 703-519-1653 www.ndaa.org
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NDAA/NCPCA

- 44 Canal Center Plaza, Suite 110, Alexandria, VA 22314
- Phone: 703-519-1653
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Thank You

- Thank you to NCPA for portions of this presentation
